

Barnan Assoc., LLC v 25 Park at 1296 Third Ave.

2017 NY Slip Op 30531(U)

March 15, 2017

Supreme Court, New York County

Docket Number: 152297/2015

Judge: Eileen A. Rakower

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SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF NEW YORK: PART 15

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 Barnan Associates, LLC,

Plaintiff,

- v -

25 Park at 1296 Third Avenue, LLC
 and Andrew Brettschneider,

Defendants.
 -----X

Index No.
 152297/2015

DECISION
 and ORDER

Mot. Seq. 003

HON. EILEEN A. RAKOWER, J.S.C.

This is an action to recover unpaid rent and damages due from defendants, 25 Park at 1296 Third Avenue, LLC (“25 Park”), and Andrew Brettschneider (“Brettschneider”) (collectively, “Defendants”) to plaintiff, Barnan Associates, LLC (“Plaintiff”), under a lease, made as of September 23, 2010, between Plaintiff, as landlord, and 25 Park, as tenant, for a term of ten years (the “Lease”), which demised premises designated as Certain Street Level Retail Premises (the “Premises”), located in the building known as 1296 Third Avenue, a/k/a 196 East 75th Street, New York, New York 10021 (the “Building”). In a written guaranty dated September 20, 2010 (the “Guaranty”), Brettschneider personally guaranteed 25 Park’s obligations under the Lease.

After issue was joined and prior to any discovery, Plaintiff moved for summary judgment against Defendants on the issues of both liability and of damages. In opposition, Defendants argued, *inter alia*, that summary judgment should be denied based on the grounds that Plaintiff may have commingled 25 Park’s \$87,000 security deposit (the “Security Deposit”), deposited with Plaintiff pursuant to the Lease, with Plaintiff’s own funds. In reply, Plaintiff submitted affidavits of both its CFO and a bank official.

After oral argument, the Court dismissed twelve of Defendants’ fifteen affirmative defenses and granted Plaintiff summary judgment against Brettschneider

on the issue of liability, but otherwise denied the Motion, ruling on the record as follows:

To the extent that Barnan has sought summary judgment, they have shown liability on the part of Mr. Brettschneider to guarantee the amounts due. They have shown that there are amounts due. However, the defendant has raised the issue of unclean hands and not applying the security deposit, not holding the security deposit in a segregated account. In reply, the plaintiff has not put that issue to rest. Instead, the plaintiff only shows that after re-letting the premises, they have a statement of \$87,000 in an account that does earn interest; and shows zero interest having been earned prior to that date, which is confusing, and makes it seem as though that account was not opened until sometime after it should have been segregated and so, that issue is still open for litigation. So the — but that is an issue that can be raised by 25 Park, not Mr. Brettschneider. And so, as to liability, summary judgment is granted as to Mr. Brettschneider with amounts to be determined. So it is just on the issue of liability and as to 25 Park, the affirmative defenses will bar summary judgment at this time.

The court thereby denied Plaintiff's motion for summary judgment as to 25 Park and based on the issue concerning the security deposit, declined to dismiss affirmative defense numbers four, eleven and fifteen (defenses based upon unclean hands, equitable estoppel and a dispute over the rental amounts sought).

Presently before the Court is Plaintiff's motion for a renewed motion for summary judgment, pursuant to CPLR 3212 and/or CPLR 2221(e). Plaintiff argues that the summary judgment is warranted because 25 Park has failed to proceed with discovery on the issue of the security deposit that they claimed they needed and because the evidence, including an affidavit from Lisa Peppe-White, in the accounting department of Hampton Management LLC ("Hampton"), agent for Plaintiff, which shows that the Security Deposit was properly deposited and maintained by Plaintiff as required under the Lease. Annexed to Peppe-White's affidavit is a copy of "a complete set of monthly bank statements (the 'Statements') prepared by JPMorgan Chase Bank, N.A. ('Chase') for ... a segregated account

maintained by Plaintiff in the name of Defendant 25 Park At 1296 Third Avenue LLC ('25 Park')."

In her affidavit, Peppe-White avers:

The Statements, which are received and maintained by Hampton in its regular course of business as Plaintiff's agent, conclusively establish that from November 2010 (when the relevant funds were first deposited by Plaintiff) to date, Chase has continuously held, and is currently holding, the entire amount of 25 Park's security deposit under its Lease with Plaintiff - \$87,000.00- in a segregated account belonging to 25 Park. As Plaintiff's Lease with 25 Park does not require 25 Park's security deposit to be maintained in an interest bearing account, the interest earned on the account is removed quarterly by Hampton and kept by Plaintiff as an administrative fee.

The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law. That party must produce sufficient evidence in admissible form to eliminate any material issue of fact from the case. Where the proponent makes such a showing, the burden shifts to the party opposing the motion to demonstrate by admissible evidence that a factual issue remains requiring the trier of fact to determine the issue. The affirmation of counsel alone is not sufficient to satisfy this requirement. (*Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]). In addition, bald, conclusory allegations, even if believable, are not enough. (*Ehrlich v. American Moninger Greenhouse Mfg. Corp.*, 26 N.Y.2d 255 [1970]).

Here, Plaintiff has made a prima facie showing of entitlement to summary judgment on the issue of liability on its claim for unpaid rent and damages due from 25 Park under the parties' lease. Where the movant has established a prima facie showing of entitlement to summary judgment, the motion, unopposed on the merits, shall be granted. (*See generally Access Capital v. DeCicco*, 302 A.D. 2d 48, 53-54 [1st Dept. 2002]). By failing to oppose, 25 Park has failed to raise any issue of material fact to preclude the granting of summary judgment in Plaintiff's favor.

Based upon the foregoing, it is hereby

ORDERED that Plaintiff's motion for summary judgment against Defendant 25 Park at 1296 Third Avenue, LLC is granted on the issue of liability without opposition; and it is further

ORDERED that an assessment of damages against defendant 25 Park at 1296 Third Avenue, LLC is directed; and it is further

ORDERED that a copy of this order with notice of entry be served by the movant upon the Clerk of the Trial Support Office (Room 158), who is directed, upon the filing of a note of issue and a statement of readiness and the payment of proper fees, if any, to place this action on the appropriate trial calendar for the assessment hereinabove directed.

This constitutes the Decision and Order of the Court. All other requested relief is denied.

Dated: MARCH 15, 2017


J.S.C.
HON. EILEEN A. RAKOWER

Check one: FINAL DISPOSITION X NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE